BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9316
File: 20-363990 Reg: 12076790

NASHAT ZAITOON,
dba Zaitoon's AM/PM
605 South Mills Road, Ventura, CA 93003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

Nashat Zaitoon, doing business as Zaitoon's AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Nashat Zaitoon, appearing through his counsel, Jimmy Philip Mettias, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

---

[1]The decision of the Department, dated September 28, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 11, 2000. On April 10, 2012, the Department filed an accusation charging that appellant's clerk, Alfredo Aguilar (the clerk), sold an alcoholic beverage to 19-year-old Michael Alstot on January 26, 2012. Although not noted in the accusation, Alstot was working as a minor decoy for the Ventura Police Department at the time.

At the administrative hearing held on August 14, 2012, documentary evidence was received, and testimony concerning the sale was presented by Alstot (the decoy) and by Sovantana Tan, a Department agent who participated in the operation. Appellant presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the premises, and Agent Tan entered shortly behind him. The decoy selected a six-pack of Bud Light beer from the cooler and took it to the counter.

The clerk asked to see the decoy's identification. The decoy handed the clerk his California driver's license. The clerk examined it for a few seconds, then rang up the sale. The decoy paid, and the clerk bagged the beer and handed the decoy his change.

The decoy went to the front of the premises and waited. Officer Cleavenger of the Ventura Police Department entered the premises, and along with Agent Tan, contacted the clerk. Agent Tan asked the decoy to identify the individual who sold him the beer. The decoy pointed at Aguilar and said, "He sold me the alcohol. I'm only 19." A photograph was taken, and the clerk was cited.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. As this was

appellant's third sale-to-minor violation within 36 months, a penalty of revocation was imposed.

Appellant filed a timely appeal contending: (1) the Department failed to prove notice of a sale-to-minor violation was supplied within 72 hours, as required by section 25658(f); (2) the face-to-face identification was not conducted by the officer in charge of the operation; and (3) the Department did not establish that the beverage purchased by the decoy was an alcoholic beverage.

DISCUSSION

I

Appellant contends that the Department did not show that it supplied the appellant with notice of the sale to minor violation within 72 hours as required by section 25658(f).

Section 25658(f) states:

> After the completion of every minor decoy program performed under this subdivision, the law enforcement agency using the decoy shall notify licensee within 72 hours of the results of the program. When the use of a minor decoy results in the issuance of a citation, the notification required shall be given to licensees and the department within 72 hours of the issuance of the citation. A law enforcement agency may comply with this requirement by leaving a written notice at the licensed premises addressed to the licensee, or by mailing a notice addressed to the licensee.

As this Board has noted, "[s]ince the duty to furnish the notice is placed on the law enforcement agency, and not on the Department, the failure to provide such notice is no defense to a Department proceeding." (*The Lost Isle Partners, LP* (2004) AB-8127.)

Moreover, this Board has discussed the limited effect of the notice provisions contained in section 25658, subdivision (f):

> There is nothing in the section in question purporting to be a

> sanction for any failure to comply. More specifically, there is nothing in subdivision (f) that even suggests its non-compliance gives rise to a defense to a sale-to-minor charge.
>
> Where no sanction is provided for the failure of an agency to perform an act within a specified period of time, the statute will be construed to be "directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." (*Outdoor Resorts/Palm Springs Owners' Association v. Alcoholic Beverage Control Appeals Board* (1990) 224 Cal.App.3d 696, 702 [273 Cal.Rptr. 748], quoting from *Woods v. Department of Motor Vehicles* (1989) 211 Cal.App.3d 1263, 1267 [259 Cal.Rptr. 885].)

(*Yaghnam* (2001) AB-7758, at p. 6.)

In this case, the task of providing notice fell on the Ventura Police Department. Indeed, Agent Tan testified that Officer Cleavenger of the Ventura Police Department completed the relevant notice forms. [RT at pp. 28-29.] Appellant nevertheless insists that the Department failed to prove notice, and asserts that "[t]he legislature obviously intended for the notice to be a part of the combined effort between law enforcement and the ABC." (App.Br. at p. 3.) Staff can find no such language within the statute, obvious or otherwise.

In any event, because the notice provisions of section 25658(f) are directory, rather than mandatory, a failure of notice is not fatal to the Department's case.

II

Appellant contends that the Department's case fails because Officer Cleavenger, the police officer in charge of the operation, did not testify and did not conduct the face-to-face identification, as required by rule 141(b)(5).

Rule 141, subdivision (b)(5), states:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This Board has held that "there is full compliance with Rule 141(b)(5) "when one of the officers involved in the decoy operation, who has seen or is aware that a sale to the decoy occurred, is delegated, either expressly or by implication, as the person to conduct the identification, and does so." (*Equilon Enterprises, LLC* (2000) AB-7575, at p. 4; see also *Sanchez* (2003) AB-7928; *Quik Stop Markets, Inc./Sangha* (2001) AB-7399; *The Southland Corp./Gonzalez* (2000) AB-7392.)

An appellate body is prohibited from reversing for error unless, after considering the entire record, it is clear that the error has caused a miscarriage of justice. (Cal. Const., art. VI, §13; Cal. Code Civ. Proc. §475; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 [87 Cal.Rptr.2d 754.) Appellant has the burden of spelling out in his brief exactly how the error caused a miscarriage of justice. (*Paterno*, supra, at p. 106.)

This Board reviews an appeal using the substantial evidence rule, and is bound by the Department's factual findings absent an abuse of discretion:

> The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1979) 88 Cal.App.3d 823 [152 Cal.Rptr. 98].) The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonable deducible from the evidence. (*Johnson v. Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880 [52 Cal.Rptr. 76].)

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) This Board may not exercise its independent judgment on the effect or weight of the

evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. Of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

In this case, there is some confusion as to whether Agent Tan or Officer Cleavenger conducted the face-to-face identification. On direct examination, Agent Tan suggested that he did so:

> Q And did you ask Mr. Alstot who sold him the beer?
> A Yes, I did.
> Q Do you remember the exact words you used?
> A "Who sold you the alcohol?"
> Q And what did he say?
> A "He sold me the alcohol, and I'm only 19."

[RT at p. 18.]

Tan's testimony on cross-examination, however, suggests that it was, in fact, Officer Cleavenger who conducted the identification:

> Q Okay. Now, Officer Cleavenger is the peace officer then who allegedly advised clerk Aguilar that he had sold alcohol to a minor; is that right?
> . . . .
> Q Did he?
> A I would say we both did because I was standing right next to him when we contacted the clerk.
> . . . .
> Q Okay. I want to ask you if you'd please clear up a little bit of confusion for me. The peace officer directing this decoy program was Officer Cleavenger, as we know. Who made the reasonable attempt to have the minor decoy who purchased the alcoholic beverage make a face-to-face identification with the alleged seller; Cleavenger or you?

A Cleavenger.
Q Okay.

[RT at pp. 27, 29.] Agent Tan, however, also testified that he was present at the identification and stood approximately two feet away while the identification took place. [RT at p. 30.]

Ultimately, the ALJ determined it was Tan who conducted the face-to-face identification. (Findings of Fact ¶8). In its reply brief, however, the Department argues that Agent Tan and Officer Cleavenger contacted the clerk together, but that it was Cleavenger who asked the decoy who sold the alcohol. (Reply Br. at pp. 3, 10.) The Department's reply apparently contradicts the ALJ's findings.

Where evidence conflicts, this Board is bound to accept the conclusions reached by the ALJ. Faced with inconsistent testimony, the ALJ concluded that it was Agent Tan who conducted the identification. This Board is not entitled to second-guess the ALJ's findings on this point. Even if the ALJ's findings were erroneous – which they are not – such an error could not result in a miscarriage of justice, as it is undisputed that the identification itself took place.

There is no question that Tan was qualified to conduct the face-to-face identification and to testify regarding the operation. The ALJ found that Agent Tan entered the premises shortly after the decoy. (See Findings of Fact ¶6.) Agent Tan testified that he observed the sale. [RT at pp. 13-17.] The ALJ also found that Tan conducted the face-to-face identification. At a minimum, Tan stood only two feet away as the identification took place. As an officer involved in the decoy operation who observed the sale, Agent Tan was qualified to conduct the face-to-face identification and to testify. Appellant's argument to the contrary is meritless.

III

Appellant contends that the Department did not establish, through actual evidence, that the Bud Light purchased by the decoy was an alcoholic beverage.

Government Code section 11515 permits an ALJ to take official notice of certain matters:

> In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

An ALJ may take official notice of the alcoholic content of a well-known brand of beer as part of the ALJ's expertise in the field. (See, e.g., *Patel* (2000) AB-7449, at pp.5-6.) Official notice may establish the alcoholic content of the beverage even where the can is missing or has been destroyed. (*Ibid.*) Moreover, this Board has held that Bud Light beer is so widely known that testimonial evidence of its purchase is sufficient to show that an alcoholic beverage was sold, even in the absence of official notice. (See *Circle K Stores, Inc.* (2004) AB-8102, at p. 4.)

Moreover, case law recognizes a presumption that the label of a container accurately reflects the contents. (See *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 634-635 [301 P.2d 474] ["It is a reasonable inference that the liquid poured from a bottle labeled 'vermouth' was in fact vermouth. In fact, it would have been an illegal act if the bottle was mislabeled."]; *Wright v. Munro* (1956) 144 Cal.App.2d 843, 847-878 [301 P.2d 997]; *Mammo* (2012) AB-9247, at pp. 3-

4; *Georggin* (1991) AB-6030, at p. 5.)

Undisputed testimony, supported by photographic evidence, established that the decoy purchased cans labeled "Bud Light." [RT at pp. 19, 35.] The ALJ took official notice at the hearing that Bud Light is a brand of beer. [RT at pp. 14-15.] Appellant presented no evidence or authority to refute this characterization or to counter the presumption that the cans contained the product stated on the label. Appellant's claim is therefore meritless.

This is appellant's third sale-to-minor violation in approximately 30 months. A penalty of revocation is within the penalty guidelines.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.